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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DERRELL LOVE DUDLEY, Defendant and Appellant.	B204128 (Los Angeles County Super. Ct. No. BA316465)

APPEAL from a judgment of the Superior Court of Los Angeles County, William R. Pounders, Judge. Affirmed.

Marilyn Drath, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Derrell Love Dudley appeals from his conviction of carjacking, with an enhancement for personal use of a firearm. (Pen. Code, §§ 215, subd. (a), 12022.53, subd. (b).)[1] He contends the trial court committed reversible error by failing to adequately instruct the jury regarding the requisite intent for the offense of carjacking. He also contends the trial court coerced the jury into returning a verdict after the jury announced that it was deadlocked. As to the post-verdict proceedings, appellant argues that the trial court committed reversible error by denying his motion for self-representation and by refusing to continue the sentencing hearing after appointing new defense counsel.

We find no prejudicial error, and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Very early in the morning on January 29, 2007, victim Margaret Watts drove home alone after going to a club. She was driving a friend's red 2004 Impala. Around 4:00 a.m., she parked outside the Los Angeles apartment complex where she resided. A white van parked behind her, and as Watts started to get out of the car, she noticed a man standing beside her. Watts later identified the man standing beside her car as appellant. Appellant grabbed Watts's shirt and said, "Bitch, give me your shit." At that time, Watts had the car keys in her right hand and a purse on her left arm. Watts "tussle[d]" with appellant for a couple of seconds as he tried to grab the keys and purse. Appellant then pulled a gun out of his jacket and pointed it straight at her. Watts grabbed the gun and tried to point it away from her upper body, but appellant snatched the gun back and pointed it at her again. At some point during this interaction, appellant took the purse and keys. Watts then heard somebody get out of the white van. This person said, "Don't shoot her, just get the shit and come on." As appellant looked toward the other person, Watts ran into the apartment complex, screaming for her mother. Appellant did not follow her. Watts made a report to the police the same night. She told the responding

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

officer that the Impala had been taken, and she gave descriptions of both the man who pointed the gun at her and the other man from the white van.

The next day, January 30, police officers responded to a report of "car stripping," meaning parts were being removed from a vehicle. The responding officers saw a red Chevrolet Impala on cinder blocks, with the hood, trunk, and all four doors open. Three individuals, including appellant, were in the vehicle. Appellant had an amplifier and a screwdriver in his hands. The officers identified themselves as police as they approached the vehicle. Two of the individuals in the vehicle fled, including appellant. Appellant was taken into custody about three hours later, after a K-9 unit located him hiding in a crawlspace underneath a vacant house.

Detective Kevin Pierce of the Los Angeles Police Department was assigned to investigate Watts's carjacking. When he saw that the Impala taken in that incident had been recovered, he compared Watts's descriptions of the two men to the descriptions of the people arrested for stripping the car and concluded there were similarities. Detective Pierce compiled a photographic lineup that included appellant. Watts identified the picture of appellant as her assailant. In a separate photographic lineup, Watts was shown a second suspect arrested in connection with the car stripping, but she could not identify his picture.

Appellant was charged by amended information with carjacking (§ 215, subd. (a)), and it was alleged he had personally used a firearm in the commission of that offense (§ 12022.53, subd. (b)). It was further alleged that he had suffered a prior conviction of a serious or violent felony for the purposes of sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i); a prior conviction of a serious felony for the purposes of section 667, subdivision (a)(1); and a prior conviction for which a prison term was served, and that he had not remained free of custody for five years subsequent to that prison term for the purposes of section 667.5.

Appellant was tried before a jury in May 2007, but a mistrial was declared after the jury was unable to reach a verdict.

A second jury trial commenced July 18, 2007. The jury returned a guilty verdict on the carjacking charge, and found true the personal use of a firearm allegation. In a bifurcated proceeding, the trial court found the allegations regarding prior convictions to be true. Appellant was sentenced to a determinate term of 25 years. (We discuss the post-verdict proceedings, including sentencing, in greater detail below, in connection with procedural issues raised by appellant.)

Appellant timely appeals from the judgment of conviction.

DISCUSSION

I

Appellant contends the trial court committed reversible error by failing to instruct, sua sponte, that the requisite intent for the offense of carjacking must have been formed before or during the use of force or fear.

The trial court instructed the jury regarding intent using CALJIC No. 3.31, and instructed the jury on the elements of carjacking using CALJIC No. 9.46. Thus, the jury was instructed as follows: "As to the intent required. In the crime charged, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists, the crime to which it relates is not committed. The specific intent required is included in the definition of the crime set forth elsewhere in these instructions. As to the crime charged. Defendant is accused of having committed the crime of carjacking, a violation of section 215 of the Penal Code. Every person who takes a motor vehicle in the possession of another from his or her person or immediate presence or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the vehicle of his or her possession, accomplished by means of force or fear, is guilty of the crime of carjacking, in violation of Penal Code section 215. . . . In order to prove this crime, each of the following elements must be proved: one, a person had possession of a motor vehicle; two, the motor vehicle was taken from his or her person or immediate presence or from the person or immediate presence of a passenger of such vehicle; three, the motor vehicle was taken

against the will of the person in possession; four, the taking was accomplished by means of force or fear; and, five, the person taking the vehicle had the intent to either permanently or temporarily deprive the person in possession of the vehicle of that possession."

Appellant asserts the instruction was inadequately specific as to the requirement that the intent to take the vehicle must have been formed before or during the use of force or fear. In support of this argument, he points to CALCRIM No. 1650, which sets forth the same five elements of carjacking as the CALJIC instruction, but goes on to read, "The defendant's intent to take the vehicle must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit carjacking." Because Watts's assailant asked for her "shit" and took both the keys and the purse, appellant contends the jury could have concluded that the only intent formed before the use of force or fear was the intent to take the purse. Because the jury was not properly instructed, appellant argues, the jury "may have found appellant guilty of carjacking even if there was a reasonable doubt as to when he formed the intent to take the vehicle."

Appellant's trial counsel apparently did not request more explicit instruction on the issue of intent. "'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) As we shall explain, we are satisfied the instruction given was correct in law.

"'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Accordingly, the trial court has a sua sponte duty to instruct the jury regarding the required concurrence of act and specific intent for the crime of

carjacking. (See § 215, subd. (a) [defining carjacking as "the *felonious taking* of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and *with the intent to either permanently or temporarily deprive* the person in possession of the motor vehicle of his or her possession, *accomplished by means of force or fear*" (italics added)].)

When given in conjunction with proper instruction on the elements of the charged crime, including the requisite mental state, CALJIC No. 3.31 explains the necessary timing of the formation of intent. Although we have found no published opinions on this issue that specifically pertain to carjacking, cases analyzing jury instructions as to the specific intent required for robbery are instructive.[2] For example, in *People v. Hughes* (2002) 27 Cal.4th 287, 358-360 (*Hughes*), the Supreme Court found that a jury instructed with CALJIC Nos. 3.31, 9.40 (defining robbery), and 8.21 (defining felony murder in the commission of a robbery) had been adequately instructed regarding the concurrence of act and specific intent. Citing *Hughes*, the court reached the same conclusion in *People v. Valdez* (2004) 32 Cal.4th 73, 112: "'Reading CALJIC Nos. 8.21 and 9.40 together with No. 3.31, we believe that a reasonable juror would understand that defendant had to possess the specific intent to steal prior to or during his application of the force required for the commission of the offense of robbery.'"

We conclude that CALJIC Nos. 3.31 and 9.46, taken together, adequately instructed the jury that appellant had to form the specific intent to take Watt's vehicle before or during the time that he used force or fear against her. "In assessing whether the jury instructions given were erroneous, the reviewing court '"'must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.'"'" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148.)

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[2] Like the crime of carjacking, the crime of robbery (§ 211) requires that the defendant form the intent to steal before or during, rather than after, the application of force to the victim. (See, e.g., *People v. Lewis* (2008) 43 Cal.4th 415, 464-465.)

The cases relied on by appellant (*People v. Forte* (1988) 204 Cal.App.3d 1317 (*Forte*) and *People v. Brady* (1987) 190 Cal.App.3d 124 (*Brady*), both disapproved in *People v. Montoya* (1994) 7 Cal.4th 1027, 1039), do not persuade us otherwise. *Forte* and *Brady* both involved jury instructions regarding liability for aiding and abetting the crime of burglary. (*Forte, supra,* 204 Cal.App.3d at p. 1319; *Brady, supra,* 190 Cal.App.3d at p. 135.) In each case, the court found the jury was inadequately instructed regarding formation of the requisite intent by the aider and abetter as opposed to the principal. (*Forte, supra,* 204 Cal.App.3d at p. 1323; *Brady, supra,* 190 Cal.App.3d at p. 137.) In each case, the court expressed concern that the jury may have reached a guilty verdict despite finding that the aider and abetter's intent was formed after the principal completed the burglary. (*Forte, supra,* 204 Cal.App.3d at p. 1324; *Brady, supra,* 190 Cal.App.3d at p. 137.) No such concern is present in this case.

We conclude the trial court did not err with regard to instructing the jury on the intent element of the carjacking offense. Appellant is not entitled to reversal on this basis.

II

Appellant next contends the jury was coerced by the trial court into returning a verdict after it had indicated that it was unable to reach a unanimous verdict.

The jury retired to commence deliberations at 11:56 a.m. on July 23, 2007. A break was taken from noon to 1:30 p.m., and at 1:45 p.m., the jury requested read back of Watts's testimony. Read back concluded at 3:42 p.m., at which time the jury resumed deliberations until separating for the evening at 4:10 p.m. The next day, July 24, at 1:45 p.m., the trial court received a note from the jury which read, "After extensive and diligent deliberation of all the evidence in this case, it is the opinion of all 12 jurors that we have reached an impasse and that we are unable to reach a unanimous verdict in this case." The trial court informed counsel it was concerned that the jury had not read the instructions, because the jury had requested read back of the key witness's testimony only fifteen minutes into deliberations on July 23 and because the jury had not followed the court's instruction regarding the form to be used for submitting notes. The court

indicated it was inclined to send the jury back for further deliberations and to offer further read back, further explanation of the law, re-argument on any issue, and a suggestion that jurors argue the opposite position from their current stance. When asked for input, defense counsel raised no objection, saying only, "I don't have any suggestions."

After reading the note back to the jury, the trial court instructed the jurors as follows: "I've got a couple of things I want to mention about [the note] and good things and bad things about the way things have gone so far. Good thing, I understood this morning that the bailiff was informed from somebody on the jury that the jury was deadlocked, but you continued to deliberate until this afternoon, and that was good. That meant that you were still trying. On the bad side, I don't think you're paying enough attention to the instructions, and the reason I gave them to you in written form for each of you just so you could understand what the law is, what the procedures are and comply with them. One example, I've never had a jury after the first 15 minutes of deliberations ask for a read back of the key witness in a case. I was astounded. Second thing, it says in here how to handle a question. If you have a question, a concern, a comment to make, there is a form you fill out for that, and you weren't following that. So I don't think you're paying enough attention to the instructions. There are several things we can do at this stage. One is to offer you some options. One option you've already exercised, read back of testimony, and that's still available. Second is if you don't understand the law, and I think it's fairly simple, but if you have any problem with it, need any further definitions or anything, you can ask me for that. Third thing that has been very effective in some cases that we've tried where the jury is having trouble arriving at a unanimous decision is to specify one or more areas in which further argument by the attorneys might help you arrive at a decision. And a fourth thing that I think is really good for you during deliberations when there is some kind of impasse is for each of you to relate the other side's position on the issues so you fully understand what the other side is. Whoever disagrees with you, you tell them what you think they said, what—why they stand as they do, whether they believe or disbelieve witnesses, whether they think there's a failure of

proof or a tremendously persuasive proof on some side, give the other side your analysis of what they're saying, and you might be surprised that you don't really understand what they're saying. Anything else we can do to assist you, I'd be happy to do. I don't think any jury can say after about a day of deliberations that they are wrapped up and they can do nothing further, so I do want you to continue deliberations. Let me know if any of those things can help you and see if you can arrive at a decision, especially using that process of it's called reverse argument, I think it is. Argue the other side, see if you understand what they say. So return to your deliberations." Deliberations resumed at 2:43 p.m. At 3:48 p.m., the jury informed the court it had reached a verdict.

Appellant describes the trial court's demeanor while giving the supplemental instruction as "angry," and contends the court intended to pressure the jury to return a guilty verdict without using the coercive language explicitly disapproved in earlier cases. This contention is not supported by the record.

Under article I, section 16 of the California Constitution, a criminal defendant is entitled "to have his guilt or innocence determined by the unanimous verdict of a jury of 12 persons." (*People v. Gainer* (1977) 19 Cal.3d 835, 849.) In order for the court to discharge the jury without a verdict, it must "satisfactorily appear[] that there is no reasonable probability that the jury can agree." (§ 1140.) "[T]he question whether to declare a hung jury or order further deliberations rests . . . in the trial court's sound discretion." (*People v. Bell* (2007) 40 Cal.4th 582, 616.)

The trial court may take a variety of steps in order to ascertain whether there is a reasonable probability that the jury can agree. The court may inquire into the numerical division of the jury, without inquiring into how many are for conviction and how many are for acquittal. (*People v. Proctor* (1992) 4 Cal.4th 499, 538-539.) The court may suggest, but not order, methods of deliberation such as reverse role playing. (*People v. Whaley* (2007) 152 Cal.App.4th 968, 983.) The court may also ask whether additional argument by counsel or instruction on the law would be of assistance to the jury. (*People v. Young* (2007) 156 Cal.App.4th 1165, 1172.) The court may not, however, instruct minority jurors to reexamine their position in light of the majority, state that the case

"'must at some time be decided,'" or refer to the expense and inconvenience of a retrial. (*People v. Gainer, supra*, 19 Cal.3d at p. 852.) In sum, "'[a]lthough the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived "'as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.'"'" (*People v. Bell, supra*, 40 Cal.4th at p. 616.)

We do not find the supplemental jury instruction given by the trial court inherently coercive. Appellant argues that the court told the jury the case was "fairly simple," despite appellate opinions admonishing against instructions that refer to a case as "simple" or "clear." (See *People v. Crossland* (1960) 182 Cal.App.2d 117, 119; *People v. Crowley* (1950) 101 Cal.App.2d 71, 76.) In fact, the court did not refer to the *case* as simple, but referred to the *law* as fairly simple, in the context of offering to re-read the instructions to the jury. The very authority cited by appellant explains the unique danger in referring to evidence as simple: "These statements [describing the evidence as clear] meant that the court was of the opinion . . . that there was no basis in the evidence for a reasonable difference of opinion as to the guilt of the defendant. Reasonably intelligent jurors would know that the court would not permit a defendant to be convicted upon legally insufficient evidence . . . . Since they were not advised to acquit the defendant they could reasonably have inferred that the court expected them to convict him." (*People v. Crowley*, *supra*, 101 Cal.App.2d at p. 76.) No comparable danger exists in a reference to the law as simple; the jury is the finder of fact, not of law.

Appellant also argues that the court should have re-instructed the jury that each juror must decide the case for himself or herself and that the defendant and the people are entitled to the individual judgment of each juror. We are not convinced that the trial court's failure to reinstruct the jury on this point rendered the supplemental instruction coercive. (See *People v. Bell*, *supra*, 40 Cal.4th at p. 616.) The jury had already been properly instructed regarding the necessity of each juror deciding the case for himself or

herself. At no point was the jury instructed that it was required to reach a verdict. (See *People v. Moore* (2002) 96 Cal.App.4th 1105, 1121.)

Regardless of the language used, appellant argues, the trial court's tone and demeanor during the delivery of the supplemental instruction was intended to pressure the jury into reaching a verdict. In an effort to show support for this argument on a cold record, appellant points to the court's comments (made outside of the jury's presence) that the jury might have "something nasty to say about the judge that wasn't kind to them" and that he told the jury "the reasons [he] was angry at them [were] that they weren't reading the instructions, they weren't complying with the instructions, they were going off on their own." Appellant also points to a comment that defense counsel made to the trial court on the record, reporting that after the verdict was announced, "[a juror] inquired why was the judge so mad at us . . . [and] said it looked a little strange to us that after we'd been reprimanded or scolded that we changed our vote." Even assuming for the sake of argument that we may properly consider an attorney's unsworn report of a juror's comments, this comment does not show that the juror believed the court's anger was directed at the jury's initial failure to reach a verdict. In fact, the juror's inquiry shows at most that the juror was unsure why the judge was "mad."

We note that the trial court did not inquire into the numerical division of the jury, much less into the number of jurors favoring acquittal or conviction. Thus, this case is distinguishable from those in which a court's supplemental instruction could have been perceived by the jury as encouraging a small minority of holdout jurors to join the majority. (See *People v. Bell*, *supra*, 40 Cal.4th at p. 617; *People v. Gainer*, *supra*, 19 Cal.3d at pp. 848-850.)

For these reasons, we are satisfied that the jury's unanimous verdict was not the product of coercion by the trial court.

III

Appellant contends the trial court committed reversible error by denying his post-verdict motion to represent himself.

"A criminal defendant has a right to represent himself at trial under the Sixth Amendment to the United States Constitution. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*); [citation].) A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial." (*People v. Welch* (1999) 20 Cal.4th 701, 729.)

The trial court stated that it was denying appellant's *Faretta* motion because appellant was not competent to waive the right to counsel and represent himself, due to a recent suicide attempt. Appellant contends that the court did not apply the correct standard for determining whether appellant was competent to waive his right to counsel. He is arguably correct. The standard of competence to waive the right to counsel is the same as the standard of competence to stand trial. (*Godinez v. Moran* (1993) 509 U.S. 389, 400-401; but see *Indiana v. Edwards* (2008) 554 U.S. __ [128 S.Ct. 2379, 2388] ["[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."].)

Yet we need not decide whether the trial court erred in concluding appellant was not competent to waive the right to counsel, because our review of the record reveals appellant's *Faretta* request was equivocal. When the record as a whole reveals a proper ground for the trial court's denial of a *Faretta* motion, we will uphold the ruling. (*People v. Dent* (2003) 30 Cal.4th 213, 218.) "Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or

frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (*People v. Marshall* (1997) 15 Cal.4th 1, 23.) "'A reviewing court, in determining whether a motion for self-representation is unequivocal, is not bound by the trial court's apparent understanding that the defendant was making a motion for self-representation.'" (*People v. Valdez, supra,* 32 Cal.4th at p. 99.)

Appellant raised the issue of self-representation after the conclusion of the bench trial on the prior conviction allegations. When the court indicated it was ready to set a date for motions and sentencing, appellant's attorney, Gerald Williams, informed the court that appellant wished to make a *Marsden*[3] motion. Williams then added, "I'm not sure what Mr. Dudley wants because he's now telling me he wants to do a *Faretta* motion and go pro per." The court explained to appellant that the remaining issues involved a possible new trial motion and sentencing, and that these were complicated legal issues best handled by an attorney. Appellant replied that he had made the *Marsden* motion because he wanted to speak to the court in private, without the presence of the district attorney. The court asked the district attorney to step out, and the following exchange occurred:

> "[APPELLANT]: I just feel like that, you know, I know my attorney, he could have did—he could have did more for me to win my case. I mean he could have objected to a lot of things and stuff. He could have put it, you know, his motions or whatever. I don't feel that I had like—how can I say, proper counsel due to the fact that it was motion that I gave my attorney, I asked him to put the motions in, motions never put in. I just—I just want to exercise my *Faretta* rights so—
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> "MR. WILLIAMS: Your Honor, if I may. Mr. Dudley, what he may be saying *Faretta* when he means something else.
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> "[APPELLANT]: Yeah.

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[3] *People v. Marsden* (1970) 2 Cal.3d 118.

"MR. WILLIAMS: If at this point what he wants to do is bring a motion for a new trial based on ineffective assistance of counsel and he's not able to articulate that, I don't think it's really—I don't think it's really a *Marsden* and I don't think it's really *Faretta*."

Appellant provided an example of evidence he felt his attorney should have introduced, and explained, "I just want to exercise my *Faretta* rights right now so I can put in for my own motions." The court asked appellant if he wanted to handle the new trial motion and sentencing by himself. Appellant replied, "Yes," and the trial court appeared inclined to grant the motion, saying, "Okay. If that's what you want to do."

Appellant then revealed that when he was returned to the jail after his last court appearance, he was so distressed by the lengthy prison sentence he faced that he had attempted to commit suicide by swallowing a razor. The court replied, "Do you think that sounds like a good idea for you to handle the case by yourself? I've got an alternative for you . . . . What I can do is appoint another attorney to review the case to see if there should be a motion filed for new trial based on incompetency of your trial counsel . . . . I don't know what would happen if you're representing yourself and you're on suicide watch. I don't see how the two would be consistent. Why would they let you go into the law library if you're somewhat suicidal? How logical is it you represent yourself if you're suicidal?" A discussion ensued between the court and appellant as to whether appellant was competent to represent himself and whether he would have access to the jail's law library while he was on suicide watch. Williams expressed his opinion that his client was not able to represent himself under the circumstances.

Finally the court stated, "I do not find that you're competent to waive your right to counsel at this point and represent yourself. Why don't you try what I'm suggesting and see how things work out, and if they don't work out, you can make your motion again. What I'll do is appoint counsel from the bar panel to talk with you, get your concerns about it, review the record and see if a motion for new trial has any basis. . . . That doesn't mean I'm relieving Mr. Williams as your counsel." After reiterating that a new attorney would be appointed to review the record, the court asked, "Does that sound

reasonable, Mr. Dudley?" Appellant answered, "Yes." Thereafter, Paul J. Cohen was appointed to review the record, and he filed a motion for new trial on the basis of ineffective assistance of counsel. Cohen also represented appellant at sentencing. Appellant did not renew his *Faretta* motion.

Appellant's initial invocation of his right to self-representation was ambiguous at best. The court and appellant's attorney both seemed uncertain as to whether appellant was making a *Marsden* motion or a *Faretta* motion. When Williams commented that appellant might be using the term "*Faretta*" to express something else, appellant agreed. Upon the court's further inquiry, appellant expressed that he did indeed wish to represent himself for a new trial motion and sentencing. Had the discussion ended at that point, appellant's invocation of his *Faretta* right would appear to be unequivocal. But our review considers the invocation in context, including proceedings following the purported invocation. (*People v. Marshall*, *supra*, 15 Cal.4th at pp. 24-26.) After appellant's unprompted revelation of a very recent suicide attempt, the court stated its intention to appoint a new attorney to review the record rather than relieving Williams as appellant's counsel. Appellant did not reiterate his wish to represent himself. Instead, when the court asked if the appointment of a second attorney sounded reasonable, appellant answered, "yes."

Additionally, the trial court informed appellant that if he was unsatisfied with the way the court's approach worked out, he could make another motion to represent himself. Appellant never exercised this option. Failure to reassert a request for self-representation when given the opportunity to do so indicates that the request was equivocal. (See *People v. Tena* (2007) 156 Cal.App.4th 598, 608.)

We conclude appellant did not unequivocally invoke the right to self-representation. Accordingly, he is not entitled to relief due to the denial of his *Faretta* request.

IV

Appellant contends the trial court committed reversible error by refusing to grant a continuance before sentencing after appointing new defense counsel.

The trial court decided on July 26, 2007, to appoint counsel to review the record and, if appropriate, file a motion for new trial. Cohen was appointed to review the record for a potential motion for new trial due to ineffective assistance of counsel on August 16, 2007. Trial counsel Williams continued representing appellant for all other purposes. After two continuances were granted, apparently at Cohen's request, appellant's motion for new trial was filed by Cohen on November 6 and heard on November 16, 2007. The trial court denied the motion. The court then asked appellant whether he wanted Cohen or Williams to represent him on the issue of sentencing, and appellant stated he wished to be represented by Cohen. The court relieved Williams as counsel, and Williams departed.

Immediately thereafter, the court turned to the issue of sentencing, and the following exchange occurred:

> "THE COURT: Any legal cause why judgment and sentence should not now be pronounced?
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> "MR. COHEN: Your Honor, I just now have been assigned the task of handling the sentence. I'm not in a position to go forward with the sentencing right now. I'd like a short continuance.
>
> "THE COURT: I'm not going to grant that. . . . We talked about that before, that he wanted you to do the sentencing before. I was going to give him that option. There is nothing much to talk about. You've got a probation report that indicates his prior convictions, which aren't good. All I've got is a choice low, middle and high term.
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> "MR. COHEN: All I got—I didn't get a probation report. All I got is the trial transcript. . . . I did not receive discovery, as it were, any priors package. Frankly, off the top of my head, I don't remember if a *Romero* motion—I'm not in a position to go forward with the sentencing.
>
> "THE COURT: I'm not in a position to grant more continuances. We've already had three of them. . . . I finally said no further continuances. We go to November 16th, and that's it."

After confirming that Williams had not filed a *Romero* motion before he was relieved, Cohen was permitted to make such a motion orally.[4] The court declined to dismiss appellant's prior strike offense, pointing out that when appellant had been granted probation in the past, he had violated probation twice.

The court sentenced appellant to a determinate term of 25 years. The court began with the midterm of five years for the carjacking offense, doubled to 10 years, due to appellant's prior strike conviction. An additional 10 years for the firearm enhancement and five years for the prior prison term was added.

Appellant makes two arguments as to why the trial court committed reversible error by denying his motion for a continuance. First, he argues that his sentencing was fundamentally unfair because defense counsel Cohen was not given the probation report two days before sentencing, as required by section 1203d. Next, he argues the trial court abused its discretion under section 1050 by refusing to grant a continuance for good cause due to the substitution of counsel. We address these contentions in turn.

Section 1203d provides, "No court shall pronounce judgment upon any defendant, as to whom the court has requested a probation report pursuant to Section 1203.10, unless a copy of the probation report has been made available to the court, the prosecuting attorney, and the defendant or his or her attorney, at least two days or, upon the request of the defendant, five days prior to the time fixed by the court for consideration of the report with respect to pronouncement of judgment." A probation report was requested as to appellant.

When a defendant is eligible for probation, failure to give defense counsel the probation report by the statutory deadline renders sentencing fundamentally unfair.

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[4] A trial court has discretion, pursuant to section 1385, to dismiss prior felony conviction allegations "in furtherance of justice" in cases brought under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12). (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) A defendant's request that the trial court exercise this discretion is commonly called a *Romero* motion, though the term "motion" is technically inaccurate since "[a] defendant has no right to make a motion, and the trial court has no obligation to make a ruling, under section 1385." (*People v. Carmony* (2004) 33 Cal.4th 367, 375.)

(*People v. Bohannon* (2000) 82 Cal.App.4th 798, 809, disapproved on another ground in *People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn.13.) In such a circumstance, a continuance must be granted. (*Ibid*.) When a defendant is ineligible for probation, but the trial court has exercised its discretion to order a probation report, the defendant is entitled to a copy of the report in accordance with the provisions of section 1203d. In the case of a defendant ineligible for probation, the untimely receipt of the probation report does not necessarily render the sentencing hearing fundamentally unfair, even if a continuance is not granted. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 34, disapproved on another ground in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752-753, fn. 3.) "[T]he better practice would be for the judge to grant a requested continuance when it is based on the untimely receipt of the probation report." (*Middleton*, at p. 34.) Nonetheless, if the judge refuses to continue the sentencing hearing, no error exists unless appellant can establish prejudice. (*Ibid*.)

Appellant was statutorily ineligible for probation pursuant to section 1170.12, subdivision (a)(2).[5] Thus, he is not entitled to reversal of the sentence imposed and remand for resentencing unless he can establish prejudice, meaning a reasonable probability that a more favorable result would have been reached had the continuance been granted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant has not made such a showing.

The probation report indicated five circumstances in aggravation, including (1) the manner in which the crime was carried out indicated planning, sophistication or professionalism; (2) appellant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings were numerous or of increasing seriousness; (3) the crime involved great violence, threat of great violence, threat of great bodily harm or

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[5] "Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, as defined in subdivision (b), the court shall adhere to each of the following: [¶] . . . [¶] (2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense." (§ 1170.12, subd. (a).)

other acts disclosing a high degree of cruelty, viciousness or callousness; (4) appellant was on parole when the crime was committed; and (5) appellant's prior performance on parole was unsatisfactory. The report did not list any circumstances in mitigation. Appellant asserts that defense counsel was unable to confirm whether the contents of the probation report were correct, since counsel did not receive the report until the hearing was underway, but he does not assert that there were, in fact, any errors in the report. Appellant also points out that defense counsel Cohen explained he did not know much about the strike prior, but he does not identify anything counsel could or would have done differently with more information about the prior conviction. Although the district attorney requested the high term for the carjacking offense, the court sentenced appellant to the middle term. It is not reasonably probable that a more favorable result for appellant would have been reached, had the continuance been granted.

We turn to appellant's argument that the trial court abused its discretion under section 1050 by refusing to grant a continuance for good cause due to the substitution of counsel. The trial court may not exercise its discretion under this section "'so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.'" (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) Appellant argues that his attorney did not have an opportunity to prepare for the sentencing hearing, because he had been appointed for the purpose of the new trial motion only and was not appointed for the purposes of sentencing until the day of the hearing. We agree that under these circumstances, a continuance would have been preferable. We need not decide whether the denial of a continuance amounted to an abuse of discretion, however, because absent a showing of prejudice, the denial does not warrant reversal. (*Ibid*.) As we have already explained, appellant has not demonstrated prejudice from the denial of the continuance. No error in this regard requires reversal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.